Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

RICHARD J. SCHNEIDERHAN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether it is appropriate to put the burden on the defendant to demonstrate a reasonable probability that he would have received a lesser sentence under an advisory guideline scheme when there is an unpreserved *Booker* sentencing error.

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RULES AND STATUTES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, A2-A18) is reported at 404 F.3d 73 (1st Cir. 2005). The opinion of the United States District Court for the District of Massachusetts (App., *infra*, A19-A32) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 13, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 52 (b) of the Federal Rules of Criminal Procedure provides, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

A grand jury returned a sealed indictment on November 15, 2000 charging the petitioner Richard J. Schneiderhan, Edward Duff, and Linda Reardon with conspiracy to obstruct justice and obstruction of justice. The case was originally drawn to the Honorable Judge Harrington. Both Duff and Reardon pled guilty and were sentenced to terms of probation. Thereafter, Judge Harrington recused himself on January 24, 2002. The case was redrawn to the Honorable Judge Keeton. In March of 2003 the petitioner proceeded to trial before Judge Keeton and a jury. The jury convicted the petitioner of both counts.

The petitioner filed a motion for new trial. On June 25, 2003, prior to sentencing, the district court heard oral argument and then denied said motion. Sentencing then occurred. The

petitioner was sentenced to concurrent terms of 18 months on each count to be followed by 36 months of supervised release; and, the petitioner requested that the Clerk timely file a notice of appeal. On June 27, 2003, the district court filed a written Memorandum and Order denying the motion for new trial. The petitioner timely requested that the Clerk file his notice of appeal. On April 13, 2005, the First Circuit Court of Appeals affirmed the district court's rulings.

The government's theory of the case was that after the government secured sealed pen register orders in September of 1999 for the phones of William Bulger and John Bulger, brothers of the fugitive James "Whitey" Bulger (who had been indicted in January of 1995), the petitioner, acting on information he received from his brother-in-law (who received it from his daughter who saw the work orders on her job at the telephone company), brought information about the phone surveillances to the Rotary Variety Store in South Boston to the attention of Kevin Weeks, and thereby obstructed justice by making it more difficult to apprehend Whitey Bulger. See Government's Opening Statement, Tr.2:22-27. The petitioner, before his indictment, during the course of two interviews with Captain Thomas Duffy and Colonel Thomas Foley of the Massachusetts State Police in April of 2000, admitted his friendship with Stephen Flemmi and eventually conceded that he delivered a typed note to the Rotary Variety for Kevin Weeks indicating that the Bulger phones were the targets of electronic surveillance. See Tr.3:167; 4:35. Thus, the only issue litigated to the jury by the defense was whether the petitioner acted corruptly in so doing.

At the sentencing hearing the district court gave the petitioner a two level upward adjustment because the court concluded that "the defendant obstructed the trial proceedings by false testimony." See Tr. 6/25/03:32; U.S.S.G. §3C1.1. The district court, not the jury, concluded, following U.S.S.G. §2J1.2 to U.S.S.G. §2X3.1, that the petitioner was in effect an accessory after the fact to a Whitey Bulger extortion. See Tr. 6/25/03: 27-28, 30-31. These conclusions led the court to a guideline range of 18 to 24 months. See Tr. 6/25/03: 40. The

district court then addressed the petitioner's motion for downward departure based on his medical issues. The government conceded that "[i]t's an objective fact that he has medical issues", but argued that they were not so extraordinary as to justify a downward departure. See Tr. 6/25/03: 43. The district court declined to depart and said as follows:

"I recognize my authority under *United States v. Koons* and provisions of the Guidelines concerning defendant's medical issues, but I find that it is not appropriate in the circumstances of this case to depart downward in view of the seriousness of the offenses of which the jury has found the defendant guilty and the absence of any expression of genuine remorse for the commission of the crime." Tr. 6/25/03: 46.

The petitioner's medical and mental problems were discussed in some detail in the Presentence Report. Those problems included a history of heart attack, colon-rectal cancer which resulted in his having a permanent colostomy bag, and major depression. See Presentence Report, pp. 27-31. The district court sentenced the petitioner to the low end of the guideline range.

REASONS WHY THE WRIT SHOULD BE GRANTED

In the aftermath of the *Booker* decision the Circuit Courts have taken widely divergent views on the appropriate approach to unpreserved *Booker* errors. In interpreting the plain error standard of *United States v. Olano*, 507 U.S. 725, 732-36 (1993) (there must be error, it must be plain, it must affect substantial rights and seriously affect the fairness of the proceedings), the problem has emerged with the prejudice prong. In the First Circuit under *United States v. Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005), the defendant must show a "reasonable probability" that the district court would impose a more favorable sentence under the new advisory guidelines scheme before remand will be ordered.

In the case at bar, although the petitioner received the low end of his mandatory guideline range, this standard was employed to reject the petitioner's arguments for remand

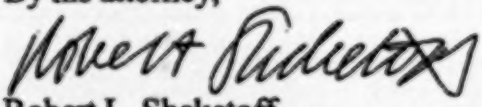
[serious medical and mental difficulties and under 18 U.S.C. § 3553 (a) (6) the unwarranted sentencing disparity between the petitioner and his co-defendants]. The petitioner had urged the First Circuit to adopt Justice Lipez's concurrence in *United States v. Serrano-Beauvaix*, 400 F.3d. 50, 57 (1st Cir. 2005), and hold that defendants invoking unpreserved *Booker* errors are entitled to a presumption of prejudice on prong three of the *Olano* test, which the government can then try to rebut. The Ninth Circuit (en banc) in *United States v. Ameline*, 409 F.3d 1073, 1080-81 (2005), reasoned that to decline to find out what the district court knows unless the defendant can make a showing of something over which he had no control would itself undermine the fairness, integrity and public reputation of the judicial proceedings. Accordingly the Ninth Circuit joined the Second Circuit's approach announced in *United States v. Crosby,* 397 F.3d 103, 120 (2nd Cir. 2005) (remanding *Booker* plain error cases to the district courts to "consider, based on the circumstances at the time of the original sentence, *whether* to resentence, after considering the currently applicable statutory requirements as explicated in *Booker*"). See *United States v. Paladino,* 401 F.3d 471, 484 (7th Cir. 2005) (retaining jurisdiction until the district court "states on limited remand [whether] he would have imposed a different sentence had he known the guidelines were merely advisory"); but compare, *United States v. Pirani,* 406 F.3d 543, 551 (8th Cir. 2005), *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005), and *United States v. Hughes,* 401 F.3d 540, 549 (4thCir. 2005) (taking similar approaches as the First Circuit).

This case provides an opportunity to bring clarity to this issue and consistency to the lower courts and the question raised by this case is fundamentally important. Therefore, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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United States Court of Appeals,
For the First Circuit

No. 03-2019

UNITED STATES of America,
Appellee,
v.
Richard J. SCHNEIDERHAN,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin and Stahl, Senior Circuit Judges.

Robert L. Sheketoff, by Appointment of the Court, for appellant.
William J. Nardini, Special Attorney, with whom Michael J. Sullivan, United States Attorney, and John H. Durham, Special Attorney, were on brief for appellee.

April 13, 2005